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CIVIL RECOURSE AND CORRECTIVE JUSTICE

ERNEST J. WEINRIB*

I. CORRECTIVE JUSTICE

The theories of civil recourse and corrective justice are so closely related that when Ben Zipursky was in Toronto several years ago presenting his paper *Civil Recourse, Not Corrective Justice,*[1] I publicly asked him whether the word "not" in the title was a typo. Civil recourse takes over the central insights of corrective justice: that the conceptual apparatus of tort law ought to be understood in its own terms rather than as a disguise for instrumental considerations; that tort law is not an operation of distributive justice; that tort liability is a response to wrongdoing; and that wrongs are violations of norms that relate the plaintiff and the defendant to each other. Although acknowledging their indebtedness to corrective justice (and indeed saluting it as "a major advance in modern interpretive tort theory"),[2] John Goldberg and Ben Zipursky nonetheless have always insisted that civil recourse is significantly different.

In the Goldberg-Zipursky formulation, tort law provides a system of redress for those with substantive standing to sue wrongdoers who have injured them. Substantive standing, in turn, is given to anyone whose rights the defendant has violated. How is this redress distinguishable from the rectification of wrongs with which corrective justice is concerned? And if it is distinguishable, does it represent an advance over corrective justice in our understanding of tort law?

As I use the term, corrective justice is composed of three interwoven strands.[3] First, the relationship between the parties is structured by the correlativity of their normative positions as the doer and sufferer of the same injustice. Second, this structure of correlativity is

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1. Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695 (2003).

2. John C.P. Goldberg, *Wrongs Without Recourse: A Comment on Jason Solomon's* Judging Plaintiffs, 61 VAND. L. REV. EN BANC 9, 12 (2008).

3. ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (1995) [hereinafter WEINRIB, PRIVATE LAW]; Ernest J. Weinrib, *Corrective Justice in a Nutshell*, 52 U. TORONTO L.J. 349 (2002).

expressed through the plaintiff's right, conceived as a juridical manifestation of the plaintiff's self-determining freedom in relation to others, and the defendant's correlative duty. Third, those rights and duties are secured and enforced by public institutions, notably the courts, whose function is to articulate and apply grounds of liability that accord with the parties' correlative positions.

These three strands—the structural, the substantive, and the institutional—abstractly present the most pervasive features of private law as a familiar normative practice. Reasons for liability have a correlative structure because the phenomenon of liability always correlates a particular defendant and a particular plaintiff. The role of rights and duties reflects the role of the self-determining will in the creation, transformation, and termination of relationships of private law. Adjudication is the institutional means through which public reason elaborates and applies the norms of private law. Because corrective justice treats the parties as equals within an integrated conception of rights and remedies, it reveals what it means for private law to be both fair to the two parties and doctrinally coherent. And because every sophisticated system of private law aspires—of course, not always with success—to be fair and coherent, corrective justice both systemically informs such systems and provides the internal standpoint for criticizing their shortcomings.

Corrective justice, so understood, is a unifying theoretical concept. First, it integrates the positions of the plaintiff and the defendant. The injustice done by the defendant and suffered by the plaintiff forms a single juridical event in which each party participates only through the presence of the other. Accordingly, corrective justice repudiates reasons for liability that are normatively relevant to either of the parties in isolation from the other—for example, the desirability of the defendant being subject to economic incentives or the possibility of the plaintiff insuring against loss. Instead, the liability is grounded on reasons that, by embracing both parties in their relationship, explicate the injustice between them.

Second, corrective justice integrates the injustice and its rectification by construing the latter as undoing the former. The injustice is not an occasion for a court to do what is best, all things considered, given the present situation of the parties. Rather, even after it has occurred, the injustice remains the decisive feature in the parties' relationship because the injustice to be corrected determines the available range of remedies that can correct it. What is rightfully the plaintiff's is the subject matter both of the right and of the remedy—the right entailing a duty of noninterference, the remedy a duty of restoration or reparation. Because what is rightfully the plaintiff's remains constant throughout, the remedy is the continuation of the right; together they make up a single unbroken juridical sequence. In

postulating so intimate a relationship between right and remedy, corrective justice merely draws out what the law takes for granted. Long ago Learned Hand formulated this relationship as a truism when he characterized a remedy as "an obligation destined to stand in the place of the plaintiff's rights, and be, as nearly as possible, an equivalent to him for his rights."[4] More recently, Peter Birks graphically expressed the same sentiment when he remarked that a remedy is "the same thing as the right, looked at from the other end."[5]

Broadly speaking, the supposed difference between civil recourse and corrective justice is that civil recourse accepts the first of these unifying features but rejects the second. Like corrective justice, civil recourse regards torts as relational wrongs in that their commission entails a relationship between the doer and the victim of the wrong.[6] This focus on the parties' relationship allows corrective justice and civil recourse to share a conception of tort law that is nondistributive, nonreductive, and noninstrumental. But civil recourse insists on the importance of distinguishing between the basis of the victim's claim against the tortfeasor and the nature of the remedy to which the victim is entitled.[7] "[T]he issue of whether there is a right of action . . . is distinct from the issue of what the remedy should be."[8] Goldberg and Zipursky view corrective justice's account of the relationship of right and remedy not as integrating the components of a single normative sequence, but as "conflating"[9] distinct levels of tort theory.

Accordingly, the controversy between corrective justice and civil recourse can be formulated as follows. Both approaches regard tort law (in the words that are thematic for a major Goldberg-Zipursky article) as the law of "wrongs and recourse."[10] The principal difference between the two lies in their divergent conceptions of the connection between wrong and remedy. For corrective justice, the plaintiff's remedy is continuous with the right that the defendant infringed. For civil recourse, wrong and remedy are distinct. In other words, the apparent disagreement about the law of "wrongs and recourse" concerns the meaning of the word "and."

This Article maintains that the reasons that Goldberg and Zipursky offer for differentiating their approach from corrective justice are frail indeed. Taking up the theme of the connection of wrong

4. Learned Hand, *Restitution or Unjust Enrichment*, 11 HARV. L. REV. 249, 256 (1897).

5. Peter Birks, *Definition and Division: A Meditation on* Institutes *3.13*, *in* THE CLASSIFICATION OF OBLIGATIONS 1, 24 (Peter Birks ed., 1997).

6. John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 946 (2010).

7. John C.P. Goldberg, *Two Conceptions of Tort Damages: Fair V. Full Compensation*, 55 DEPAUL L. REV. 435, 436 (2006); Zipursky, *supra* note 1, at 748.

8. Zipursky, *supra* note 1, at 712.

9. Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 82 (1998).

10. Goldberg & Zipursky, *supra* note 6, at 918.

and remedy, the following section, Part II, sets out the corrective justice conception of remedies. The basic idea of this conception is that the remedy is the continuation of the right. As the normative marker of the parties' relationship, the right survives the defendant's wronging of it and lives on in the plaintiff's entitlement to a remedy that is equivalent to it and limited by it. Part III considers several of the reasons that Goldberg and Zipursky provide for rejecting the corrective justice view, including their observations that the remedy is available only at the plaintiff's option and that the entitlement to the remedy is a power rather than a right. In response, Part III argues that the optional character of the remedy is itself a reflection of the continuity of the plaintiff's right, for it is in the nature of a right that its holder can decide whether to invoke it. Moreover, the plaintiff's power to sue for a remedy is merely a means of giving effect to an ongoing right, as is shown by the fact that the law regards the right as continuing even when the lapse of a limitation period extinguishes the power. Part IV then turns to the claim that the diversity of remedies available to repair the wrong undercuts corrective justice. This claim is unsound. The diversity of remedies merely reflects the different ways in which the plaintiff's right can be impaired and restored. Part V explores a specific aspect of the claim about remedial diversity: the contention that its hostility to punitive damages makes corrective inferior to civil recourse as a theory of American tort law. Even aside from its theoretical parochialism, this contention is not well-founded, for the differences between corrective justice and civil recourse on this score are terminological rather than substantive. Finally, Part VI points out that Goldberg and Zipursky make the defendant's wrong determinative of who can sue and for what, thereby building into the wrong the limit on what the victim of wrongdoing can legitimately demand. Despite their protestations, this fundamental feature of civil recourse is the corrective justice position adopted for corrective justice reasons, though formulated in a distinctive way. Civil recourse, it turns out, is a version of, rather than an alternative to, corrective justice. In saying this I, of course, intend no criticism. To the contrary, the fact that civil recourse is a version of corrective justice constitutes its true strength.

II. RIGHT AND REMEDY

On what grounds does corrective justice posit a continuity of right and remedy?[11] This continuity flows from the mutually complemen-

11. The continuity of right and remedy is explicit in German jurisprudence as the *Rechtsfortsetzungsgedanke*, the idea that "the injured right lives on in a claim for damages." WALTER VAN GERVEN ET AL., COMMON LAW OF EUROPE CASEBOOKS: TORT LAW 753 (2000). The standard German legal textbook treats the idea of continuity as one aspect of—and therefore less comprehensive than—the idea of compensation (the *Ausgleichsgedanke*)

tary ways in which corrective justice conceives of the structure and content of the private law relationship.[12] The structure consists in the parties being correlatively situated as doer and sufferer of the same injustice. The content consists in the plaintiff's having a right and the defendant's being under a correlative duty, so that injustice occurs on the defendant's breach of a duty correlative to the plaintiff's right. The continuity of the remedy reflects the persistence of this structure and content in the aftermath of the injustice.

This structure and content go to the reasons for holding a particular defendant liable to a particular plaintiff. As a matter of structure, the normative considerations that govern finding liability are those that implicate both parties in their relationship. As a matter of content, these considerations presuppose that the injury is to something to which the plaintiff has a right and with respect to which the defendant is under a correlative duty. Being juridical manifestations of the parties' self-determining freedom with respect to each other, right and duty are the ingredients, and not merely the conclusions, of legal argument about the terms of the parties' interaction. The task of private law is to work out the meaning of these rights and duties so as to make them coherent with one another, reflective of the idea of self-determining freedom, and applicable to the myriad concrete situations of human interaction.

In correcting an injustice, the remedy has the same correlative structure as the relationship itself because a relational injustice cannot be corrected nonrelationally. Accordingly, the remedy operates simultaneously against the defendant and in favor of the plaintiff. In an award of damages, for instance, the plaintiff is entitled to receive the very sum that the defendant is obligated to pay. If the law took money from the defendant without giving it to the plaintiff, the injustice suffered by the plaintiff would remain uncorrected. Similarly, if the law gave money to the plaintiff without taking it from the defendant, the injustice done by the defendant would remain uncorrected. Even if the law took money from the defendant and gave an equivalent amount of money to the plaintiff in separate operations (say, by requiring payment into one government fund and out of another), the injustice as something done by the defendant to the plaintiff—and therefore as being of relational significance between them—would still remain uncorrected. Structurally, the remedy is the mir-

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because it views consequential damages as falling outside the idea of continuity. *See, e.g.*, KARL LARENZ, 1 LEHRBUCH DES SCHULDRECHTS 424 (Verlag C.H. Beck ed., 14th ed. 1987). The implication of my argument in this article is that, from the theoretical perspective, continuity is the more fundamental idea. On consequential damages, see *infra* Part IV.

12. For a discussion on this complementarity, see Ernest J. Weinrib, *Correlativity, Personality, and the Emerging Consensus on Corrective Justice*, 2 THEORETICAL INQUIRIES L. 107 (2001).

ror image of the injustice. Both feature the same movement from one pole of the relationship to the other, so that, to the extent possible, the relationship ends up as free of injustice as it was at the beginning.

The correction maintains not only the structure but also the content (the right and the correlative duty) of the parties' relationship. What is correctively just about a private law relationship is the absence of breaches of any duty correlative to another's right. Conversely, injustice lies in an inconsistency with the plaintiff's right that is imputable to the defendant. The point of the remedy is to eliminate this inconsistency. In this progression from justice to injustice and back again, the same right (and, of course, the same correlative duty) is the focus of the law's attention. The right survives the injustice and continues into the remedy, which is nothing other than the judicially crystallized post-injustice shape of the right.

Now, one might think that identifying the remedy with the pre-injustice right (and its correlative duty) overstates the closeness of the connection between them. Suppose that the defendant has tortiously destroyed an object belonging to the plaintiff and now has to pay the plaintiff a sum equal to the object's value. Before the destruction, the defendant was under a duty to abstain from exposing the object to an unreasonable risk. After the destruction, the defendant cannot be under this duty because the object no longer exists. The action now required of the defendant is not abstention from creating an unreasonable risk, but transfer to the plaintiff of a certain sum of money. A duty mandates a specific action, and if the specific actions mandated are different, so are the duties.[13]

A similar argument can be made on the rights side. A right gives its holder the freedom to act within its bounds. Yet the actions permitted before the injustice may differ from those permitted after the injustice. For example, my right to bodily integrity cannot be alienated, but it may be possible for me, within restrictions set out by the positive law, to assign the damages claim that arises from the injury.[14] The fact that after the injustice one has the freedom to do actions unavailable previously indicates (so the argument would go) that the different freedoms reflect different rights rather than the continuation of the same right.

That the variety of actions prohibited or permitted attests to a variety of duties and rights is an appealing but misleading notion. It is not the case that if the specific actions mandated by the law are different, so are the legal duties. Different actions can be required by a single duty and a single action can be required by different duties. An

13. "[O]bligations . . . are individuated according to the action[s] that they make obligatory . . . ." John Gardner, *What is Tort Law For? Part 1: The Place of Corrective Justice*, 30 LAW & PHIL. 1, 29 (2011).

14. I owe this example to Lionel Smith.

example of the latter is that the same specific action may be required both contractually and delictually. As for the former, suppose that the defendant, being under a duty of care as a bailee with respect to an object belonging to the plaintiff, was obliged both to keep his car locked as he transported the object and to water the object regularly. The law would regard these two different actions as different ways of fulfilling the same legal duty, not as the fulfillment of two different duties. The fact that there are innumerable ways in which a duty could be breached does not mean that each possible breach is the breach of a different duty.[15]

A legal duty takes its character from the legal category that informs it, not from the specific action that it prohibits or requires. The same action required as a matter of both contract law and tort law is governed concurrently by two duties, one for each possible ground of liability. In my example of the bailment, the legal duty is that of a bailee, not that of a person who waters an object or transports it in a locked car.

Considered as a theoretical issue, the relation between right and remedy engages a still higher level of generality. Theory is concerned not with particular grounds of liability and their respective remedies, but with the nature of liability as such and the corresponding conception of a remedy. As noted above, under corrective justice the injustice that gives rise to liability is an inconsistency with the plaintiff's right that is imputable to the defendant. At its most general, having a right in private law means that the right-holder is normatively so connected to the object of the right that another person is under a duty not to interfere with that object.[16] The legal system lays down the grounds for acquiring and holding rights of various sorts—offer and acceptance for contract, *animus donandi* and *factum donandi* for gift, and so on. As long as these grounds obtain, the relationship of right and duty continues regardless of what the defendant has done to the object of the right. Only actions consistent with the holder's right can terminate this normative connection, as when property is alienated or a contract is discharged by performance. Conversely, the right (and the duty correlative to it) always survives an injustice, which by definition is an inconsistency with the right.

Accordingly, the defendant who, in breach of her duty, destroys an object belonging to the plaintiff does not thereby destroy the plain-

15. The distinction between a duty and a required specific action tracks Kant's obscure distinction between an obligation ("the necessity of a free action under a categorical imperative of reason") and a duty ("that action to which someone is bound. It is therefore the matter of obligation . . . .") IMMANUEL KANT, THE METAPHYSICS OF MORALS 377 (Mary Gregor trans., 2d ed. 1996). Kant adds that "there can be one and the same duty (as to the action) although we can be bound to it in different ways." *Id.*

16. "That is *rightfully mine* (*meum iuris*) with which I am so connected that another's use of it without my consent would wrong me." *Id.* at 401.

tiff's right to the object. The plaintiff remains linked to the defendant through a right that pertains to the object as an undamaged thing. Although the defendant's wrong has modified the physical condition of the object embodying the plaintiff's right, the right remains intact as the normative marker of the relationship between them with respect to that object. Even if the object no longer exists as a physical entity, the parties continue to be related to each other through the object's normative connection to the plaintiff and the consequent duty on the defendant to act in conformity with that connection. Instead of being embodied in the object itself, the right and its correlative duty with respect to the object now take the form of an entitlement to have the defendant furnish the plaintiff with its value.

The survival of the right means that its correlative duty also survives. The defendant's breach of duty did not, of course, end the duty with respect to the plaintiff's right; for if it did, the duty—absurdly—would have been discharged by its breach. To be sure, the specific action required of the defendant has been transformed by the defendant's tort. Just as the plaintiff's right is no longer embodied in the specific object, which has been destroyed, but in an entitlement to receive the object's equivalent from the defendant, so the defendant's duty is no longer to abstain from its destruction, which has already taken place, but to provide the plaintiff with the object's equivalent. The specific action that the duty requires is different, but the defendant is not under a different duty. This is because, from a juridical point of view, what determines the nature of the duty is not the specific action that the duty requires, but the right to which the duty is correlative. And what determines the right is the appropriate normative connection between the object of the right and the person holding it. So long as that connection persists, the right and correlative duty with respect to the object remain.

Thus, the right and its correlative duty continue to exist with different specific content before and after the injustice. Underlying the succession of specific characteristics of the right and its correlative duty is the relationship that the parties have through the plaintiff's connection with the object of the right. That relationship remains identical throughout the metamorphosis that the defendant's injustice has wrought in the object of the right. To put it in familiar philosophical terms, the diachronic identity of the right is merely a juridical exemplification of the category of substance as that which persists through change: during the legal relationship the existence of the right remains constant, but the way in which the right exists changes.[17] Just as a person has different characteristics at different times

17. As Kant observed:

of life while yet remaining the same person, so a right and its correlative duty have different characteristics at different points in their existence while yet remaining the same right and duty. From the juridical point of view, the parties do indeed step into the same river twice—or rather, despite the water's rush, they stand in the same river continuously.

Blackstone (whom Goldberg and Zipursky often invoke) summed up the relation between right and remedy by stating that remedies "redress the party injured, by either restoring to him his right, if possible; or by giving him an equivalent."[18] Blackstone's formulation is a paradigmatic expression of corrective justice. It implies three theses. The first is the thesis of identity, that the plaintiff's injured right and the right restored by the defendant are the same right or its equivalent. One cannot regard a right as being restored if it is other than the one the defendant wronged. The second is the thesis of limitation, that the remedy restores *only* the plaintiff's right and does not give the plaintiff more than that right (or its equivalent). Thus, the reason for creating liability also limits it.[19] The third is the thesis of continuity, that the plaintiff's right survives the injury intact and continues to be the normative marker of the parties' relationship. Because the right continues to exist, plaintiffs can justly apply to courts for the restoration of what remains rightfully theirs.[20]

> [I]n all appearances, the permanent is the object itself, that is, substance as phenomenon; everything, on the other hand, which changes or can change belongs only to the way in which substance or substances exist, and therefore to their determinations.
> I find that in all ages, not only philosophers, but even the common understanding, have recognised this permanence as a substratum of all appearance, and always assume it to be indubitable.

IMMANUEL KANT, CRITIQUE OF PURE REASON 214 (Norman Kemp Smith trans., rev. 2d ed., Palgrave MacMillan 2003) (1781).

18. 4 WILLIAM BLACKSTONE, COMMENTARIES *7.

19. For this idea in a related context see Warren A. Seavey, *Mr. Justice Cardozo and the Law of Torts*, 39 COLUM. L. REV. 20, 34-35 (1939).

20. Blackstone's terminology of restoring the plaintiff's right is not entirely felicitous, as it participates in the ambiguity of right as both something that a plaintiff has and a normative status that attaches to something that the plaintiff has. One should not think that the very description of the remedy as the restoration of a right shows that the plaintiff did not have what the remedy restores. Kant drew attention to this terminological imprecision in his discussion of external right. In Kantian terms, ownership involves possessing an object intellectually rather than empirically because the essence of ownership is that it persists even when the owner is not in physical possession of the thing owned. For this reason, he writes, "it is not appropriate to speak of possessing a right to this or that object but rather of possessing it *merely rightfully*; for a right is already an intellectual possess[ing] of an object and it would make no sense to speak of possessing a possessing." KANT, *supra* note 15, at 71. In the same way, here the wrong is a deprivation of what is rightfully the plaintiff's and the remedy restores to the plaintiff what is rightfully hers. For an illuminating treatment of remedies from a Kantian perspective, see Arthur Ripstein, *As If It Had Never Happened*, 48 WM. & MARY L. REV. 1957 (2007).

These three theses are interrelated. Rights could not be enjoyed as domains of freedom unless the law secured them against wrongs by requiring wrongdoers to restore what they have injured (the identity thesis). However, because the relationship between the parties is one of equal freedom, the plaintiff's freedom does not entitle the court to coerce the defendant into providing the plaintiff with a windfall over and above the restored right, for that, in turn, would be inconsistent with the defendant's freedom (the limitation thesis).[21] With the ideas of injury and restoration in place, one might wonder how the temporal gap between them is normatively bridged. One might suppose that the occurrence of the injury puts an end to the plaintiff's right, leaving the plaintiff without a basis for claiming what she no longer has. Perhaps all that the plaintiff can expect is an apology for the misfortune that the defendant caused.[22] The continuity thesis holds, in reply, that even after the injury the plaintiff continues to have the right to what was wrongly injured. From the normative point of view, no gap in the plaintiff's right-holding exists between the injury and the remedy.

III. OBJECTIONS

Opposed to the argument just laid out is the insistence by Goldberg and Zipursky that the right and the remedy raise distinct issues that corrective justice improperly conflates. Zipursky has raised three particular objections to the identity of right and remedy under corrective justice.[23] Running parallel to these particular objections is the contention by Goldberg and Zipursky that, in the interval between the occurrence of the wrong and the court's issuance of a remedy, the plaintiff holds a power and not a right.[24] This power thereby interrupts the continuity of right-holding that corrective justice postulates.

I turn first to Zipursky's particular objections. Zipursky writes, "First, it is highly implausible that one is discharging the duty to refrain from wrongdoing someone by compensating her ex post for the

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21. As Kant observed in his comment about tort law:

> I cannot acquire a right against another through a deed of his that is *contrary to right, (facto iniusto alterius*); for even if he has wronged me and I have a right to demand compensation from him, by this I will still only preserve what is mine undiminished but will not acquire more than what I previously had.

KANT, *supra* note 15, at 422.

22. *See* Stephen R. Perry, *Loss, Agency, and Responsibility for Outcomes: Three Conceptions of Corrective Justice*, *in* TORT THEORY 24 (Ken Cooper-Stephenson & Elaine Gibson eds., 1993).

23. Zipursky, *supra* note 9, at 73-74.

24. Zipursky, *supra* note 1, at 718-33. Goldberg and Zipursky usually formulate this from the defendant's side rather than the plaintiff's: the defendant is under a liability rather than a duty to repair. *Id.*

harm she has suffered in consequence of being wronged."[25] It is, indeed, highly implausible; fortunately, the argument that Zipursky is criticizing does not suggest it. The continuity of right and remedy means that the same relationship of right and duty continues through a sequence of stages that, on the duty side, require different specific actions. A sequence is not a smorgasbord from which the defendant can mix and match. What counts as the discharge of the duty in any given stage is determined by the actions that the duty calls for at that stage, not at a previous or subsequent one.

Accordingly, the defendant cannot satisfy the duty as it existed at one stage by performing the action called for at a subsequent stage. As a juridical instantiation of the category of substance,[26] the right and its correlative duty persist *through* change; they do not remain *un*changed. Just as my being a more mature version of the person I was as a child does not now require me to enroll in kindergarten, so the defendant who has committed an injustice can no longer satisfy his duty in its original form. The wrong committed earlier remains a wrong. The remedy vindicates the plaintiff's right by restoring what is rightfully his, thereby affirming rather than denying that the wrong occurred. Because the defendant's wrong is a breach of the duty owed to the plaintiff, the duty continues to exist in a new form that requires the performance appropriate to this new stage of the parties' relationship.

"Second, Weinrib's account does not explain why a tortfeasor might not owe a duty of repair even to those whose right was not violated."[27] This objection challenges the significance of the plaintiff's right to begin with, rather than the notion that the remedy is continuous with that right. That liability is concerned with injuries to rights rather than with harms has long been a tenet of corrective justice.[28] As explained earlier, corrective justice views the parties' relationship as structured by the correlativity of their normative positions as doer and sufferer of the same injustice. The correlative structure of reasons for liability requires the employment of concepts that are themselves correlative. Right and duty are the requisite correlative concepts. Private law, therefore, recognizes no duty on the defendant that is not correlative to the plaintiff's right. Hence, the violation of a right is necessary for the duty to repair.

"Third, and more generally, Weinrib appears to be mixing categories. The question of how one is obligated to conduct oneself toward another is different from the question of what one ought to do if one

25. Zipursky, *supra* note 9, at 74.
26. KANT, *supra* note 17.
27. Zipursky, *supra* note 9, at 74.
28. In contemporary tort theory the earliest adumbration was in Ernest J. Weinrib, *Right and Advantage in Private Law*, 10 CARDOZO L. REV. 1283 (1989).

harms another through breach of that obligation."[29] Of course, the specific action required of the defendant before and after the wrong is different. But the issue is whether the different actions required at these two stages comprise a single normative sequence in which the defendant's duty is continuously correlative to the plaintiff's ongoing right. Contrary to Zipursky's assumption, this issue is not affected by the Austinian distinction between a primary duty and the secondary duty that arises out of a violation of a primary duty.[30] That distinction merely sets out different stages in the parties' relationship; it does not address the nature of the normative connection between them.

So much for those particular criticisms. I now turn to the more general reason that Goldberg and Zipursky have for denying that the remedy is continuous with the right. They emphasize that tort law leaves correction of the wrong to the initiative, and thus to the option, of the plaintiff.[31] For them this is the key structural characteristic of tort law: it empowers the injured party to seek civil recourse without otherwise imposing a duty to repair on the wrongdoer. The consequence of the plaintiff's having the option to seek civil recourse is that the parties' relationship on the commission of a wrong is marked by the correlativity of power and liability, not right and duty.

This leads to two interconnected criticisms of corrective justice. The first criticism is that, inasmuch as corrective justice holds that the wrongdoer is under a duty to repair, it cannot explain the optionality of the plaintiff's recourse. If the point of tort law is to operate as corrective justice, and if the corrective justice imposes a duty to repair, then why does the legal system not insist that wrongdoers perform their duty? The second criticism is that if the plaintiff has a power and not a right (and, correspondingly, the defendant is under a liability and not under a duty), then the occurrence of the wrong creates an interval during which the plaintiff has no right, thereby interrupting the continuity of the right into the remedy. Whereas corrective justice conceptualizes the plaintiff's suit as the attempt to enforce an existing right, civil recourse denies that there is any right for the plaintiff to enforce. Instead, the plaintiff is merely exercising a power to apply to the court to create a new right.

In making these criticisms, the theory of civil recourse goes seriously off the rails. First, under corrective justice no mystery attends the plaintiff's option to seek a remedy. The defendant's duty to repair as a matter of corrective justice is not freestanding; it is always correlative to a right of the plaintiff. A right, in turn, gives its holder an area of freedom with respect to the subject matter of the right. One

29. Zipursky, *supra* note 9, at 74.

30. 2 JOHN AUSTIN, LECTURES ON JURISPRUDENCE 764 (Robert Campbell, ed. 5th ed. 1885).

31. John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 577 (2003).

aspect of this freedom is that it is up to the right-holder to determine whether to insist on her right, rather than abandon it, waive it, or ignore its violations. The optional character of the plaintiff's recourse simply reflects—indeed continues—this feature of the plaintiff's right. Accordingly, because corrective justice is a system of rights, tort law operates as corrective justice precisely by making the pursuit of recourse for the right's violation optional for the right-holder.

Second, the fact that the injured party has a power to sue the wrongdoer does not imply that the plaintiff lacks a right. To the contrary, in many private law contexts the power to sue is intelligible only as a means of giving effect to an already existing right. For example, the power to sue in nuisance for an injunction gives effect to the plaintiff's ongoing right to the use and enjoyment of the property. The same is true if, instead of suing in nuisance for an injunction, the plaintiff makes a claim for future damages. In such cases the existence of the power to sue does not entail an interruption in the continuity of the plaintiff's right during the interval between the wrong and the issuance of the remedy.

What about the more common instances, including liability for negligence, where the defendant's breach of duty is a past event rather than a continuing activity? Does the Goldberg-Zipursky argument apply at least in this kind of case? Unfortunately for their thesis, even in such instances the law does not conceptualize the power to sue as unaccompanied by an ongoing right. This is evident from the fact that the law treats the plaintiff's right as existing even when the plaintiff no longer has the power to sue. Consider the traditional common law doctrine that the lapse of a limitation period bars the remedy, but does not extinguish the right.[32] This doctrine presupposes that the injured plaintiff's power to sue is the means of enforcing an already existing right, not (as Goldberg and Zipursky claim) that the injured plaintiff no longer has a right until the exercise of the power creates a fresh one. Identifying the right to which the doctrine about limitation periods refers seems to pose an insoluble problem for the Goldberg-Zipursky argument. The right in question cannot refer to the prospect of recovering damages through the plaintiff's exercise of the power to sue, because that prospect is precisely what the limitations period does extinguish. Nor can the right (and its correlative duty) refer to what they might be tempted to call "moral" rather than "legal" considerations;[33] the right has sufficient legal character to play a role in other legal contexts, such as grounding a claim for con-

32. Higgins v. Scott, (1831) 109 Eng. Rep. 1196 (K.B.) 1197; 2 B. & Ad. 413, 414-15; Quantock v. England, (1770) 98 Eng. Rep. 382 (K.B.) 383; 5 Burr 2628, 2629-30.

33. Zipursky recognizes that the wrongdoer may well be under a duty to pay even in the absence of a judgment, but he ascribes this duty to moral not legal considerations. Zipursky, *supra* note 1, at 721-24.

tribution among tortfeasors[34] or preventing a claim in unjust enrichment for payment made after the limitation period passed. Thus, the contention that only a power (and not a right) exists during the interval between the wrong and the judgment fails to account for a plaintiff's postlimitation rights. For how can the plaintiff have unextinguished a right that in their view no longer exists?

In sum, none of the Goldberg-Zipursky objections succeed against the corrective justice notion that the remedy is a continuation of the right. Zipursky has said that what corrective justice needs is "an explanation of how breach of a duty is connected to the obligation to repair harm done by that breach."[35] The continuity thesis furnishes that explanation. Provided that the harm is a wrongful injury to the plaintiff's right, the obligation to repair requires the wrongdoer to correct that injustice by restoring the very right that was wrongly injured. The connection is the closest possible: the original duty and the duty to repair are successive moments within a single relationship of right and duty.[36]

IV. THE DIVERSITY OF REMEDIES

In addition to these objections, Goldberg and Zipursky also criticize corrective justice for being unable to account for the diversity of the remedies that the law makes available. The argument that they offer in support of this claim is remarkably sparse. It consists of little more than a list of remedies (injunctions, nominal damages, consequential damages, and so on) accompanied by the assertion that the diversity of the list's components undercuts corrective justice.[37] The assumption seems to be that a single conception of justice could not account for a plurality of remedies. Perhaps this assumption reflects the mistaken notion that positing the singleness of anything precludes its being internally differentiated, as if a single human body could not have a diversity of limbs and organs.

Be that as it may, the assumption that the diversity of remedies undercuts corrective justice is without foundation. Corrective justice is a normative regime of rights and their correlative duties. In awarding a remedy, the law aims to remove the inconsistency with

34. Owners, Strata Plan LMS 1751 v. Scott Mgmt. Ltd., 2010 BCCA 192, para. 57-58 (Can.); MacKenzie v. Vance, (1977) 74 D.L.R. 3d 383, 394-95 (Can. N.S. S.C. App. Div.).

35. Zipursky, *supra* note 9, at 74.

36. Goldberg and Zipursky often say that civil recourse simply reflects the ancient maxim *ubi jus ibi remedium* ("where there is a right, there is a remedy"). Goldberg & Zipursky, *supra* note 6, at 973. For what it is worth, strictly speaking, that is not the case. It is rather corrective justice that reflects this maxim because corrective justice preserves the continuity of the right to which the maxim attests. For civil recourse, the maxim would have to be the less snappy *ubi jus olim fuit ibi remedium erit* ("where there was once a right, there will be a remedy").

37. Zipursky, *supra* note 1, at 710-12.

the plaintiff's rights by having the defendant restore what is rightfully the plaintiff's. The diversity of the remedies reflects the different ways of impairing and restoring what is rightfully the plaintiff's.

Restoring the plaintiff's right can take two forms: the qualitative and the quantitative. The qualitative form restores to the plaintiff the very thing that is the subject matter of the right, thereby allowing the plaintiff to have and enjoy "its specific qualitative character."[38] In such cases the law gives specific relief, such as specific delivery of a unique or unusual chattel, specific performance of a contractual obligation, or an injunction against a private nuisance or trespass. The quantitative form restores to the plaintiff, through an award of damages, the monetary equivalent of the injury. One of the tasks of the law of remedies, of course, is to work out which of these forms of restoring the plaintiff's right is available in what circumstances—an issue that different jurisdictions handle in different ways. Nonetheless, in accordance with corrective justice, both forms of restoration exemplify the continuity of right and remedy.

Why might one think, as Goldberg and Zipursky do, that the availability of injunctive relief undermines corrective justice? Their idea seems to be that an injunction against future wrongdoing applies when there is yet no wrong to correct, whereas corrective justice operates only retrospectively.[39] This, however, misconceives corrective justice. Under corrective justice, the private law relationship is correlatively structured by the plaintiff's right and the defendant's duty. The remedy instantiates that structure by vindicating the plaintiff's right against the defendant's breach of the correlative duty. What matters is not the temporal relation between the injustice and the remedy, but the structure of the injustice and the consequent structure of the remedy. For instance, if (as I have argued elsewhere)[40] the norms against nuisances instantiate corrective justice, then so do the injunctions that prevent nuisances. Thus, corrective justice operates not only by requiring the defendant to repair a wrong once it has occurred, but also by granting the plaintiff an injunction that prevents the defendant from extending the wrong into the future.[41]

The continuity of right and remedy also holds for the various kinds of damages that figure in the quantitative form of restoration: substitutive damages, nominal damages, consequential damages, gain-based damages, and aggravated damages. Consider each of these in turn.

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38. G.W.F. HEGEL, PHILOSOPHY OF RIGHT 69 (T.M. Knox trans., Claredon Press 1942).

39. Andrew S. Gold, *A Moral Rights Theory of Private Law*, 52 WM. & MARY L. REV. 1873, 1892 (2011).

40. WEINRIB, PRIVATE LAW, *supra* note 3, at 190-96.

41. *Id.* at 144.

First, the right-holder is entitled to the physical integrity of the thing that forms the subject matter of the right.[42] Correspondingly, others are under a duty not to wrongfully interfere with that physical integrity. When such interference occurs, the right-holder's entitlement to an intact thing continues as against the wrongdoer. The wrongdoer then has a correlative duty to transfer the sum of money that leaves the right-holder with the equivalent of the thing's value in its intact state. Such damages have been termed "substitutive," in that they are awarded to the plaintiff as a substitute for the right that the defendant infringed.[43]

Second, when a right is infringed without impairing the physical condition of the object, a court awards nominal damages. The availability of nominal damages is the remedial affirmation that private law vindicates rights and does not merely repair losses. Just as no liability follows when a loss is not the wrongful infringement of a right, so conversely can a defendant be held liable, and required to pay nominal damages, for a wrong to the plaintiff's right that does not occasion a loss. The obligation to pay nominal damages is the continuation of the defendant's duty not to interfere with the plaintiff's right even when no loss results from such interference.

Third, the right-holder's entitlement to have the thing physically intact carries with it an entitlement to use the thing in its intact condition for his or her purposes. Accordingly, a wrongful interference with the thing's physical integrity may wrongfully interfere with the use, actual or prospective, to which the right-holder is putting or is likely to put the intact thing. The entitlement to use the intact thing imports a correlative duty not to wrongfully interfere with such use. This duty finds its remedial continuation is what the law terms "consequential" damages, that is, the monetary sum equivalent to the worth of the use of which the defendant wrongly deprived the right-holder.

Fourth, the right-holder has an exclusive entitlement to deal with the thing owned and can realize the thing's value by charging for its use or by selling it. The gain from the use or the sale is as much the right-holder's as is the thing itself. Accordingly, the right-holder can claim restitution of such a gain from a wrongdoer who made it through a use or a sale that was unauthorized. This award of gain-based damages (and its historical antecedent in "waiver of tort") is the continuation of the right-holder's entitlement to the thing's value.[44]

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42. For purposes of exposition I assume a wrong with respect to a corporeal object. The argument would not essentially change for non-corporeal objects, though it would be reformulated to accord with the non-corporeal nature of the subject matter of the right.

43. ROBERT STEVENS, TORTS AND RIGHTS 60 (2007).

44. Ernest J. Weinrib, *Restitutionary Damages as Corrective Justice*, 1 THEORETICAL INQUIRIES L. 1, 2-3 (2000).

Fifth, the common law recognizes that a wrongdoer may not only have injured the object of the right, but may also have done this so high-handedly as to injure the dignity of the right-holder. To compensate for such injuries to dignity the law awards aggravated damages, for a court may "take into account the motives and conduct of the defendant [when] they aggravate the injury done to the plaintiff."[45] This form of damages reflects the connection between the object of the right and the dignity that the law ascribes to the right-holder. As a system of rights, the law presupposes a distinction between persons (entities imbued with the dignity that attends the capacity for rights) and things (entities devoid of that dignity). The dignity that comes from the right-holder's connection to the object of the right is as much within the entitlement of the right-holder as the object of the right itself. Accordingly, the law awards additional damages, which it regards as compensatory, for a wrong committed in a way that imparts injury to the right-holder's dignity over and above the injury done to the object of the right itself. Such damages are the continuation of the dignity inherent in being the right-holder.[46]

Thus, it is a mistake to think that the diversity of the available remedies undermines the corrective justice account. To the contrary, one of the strengths of the corrective justice approach is that, through the robust role that it assigns to rights and their correlative duties, it provides a unifying framework for the different remedies. The different kinds of damages reflect the various kinds of entitlement that a right gives, including an entitlement to the intactness of the object of the right, to its use and value as an intact object, to its inviolability even in the absence of loss, and to the dignity that attaches to the right-holder. The distinction between monetary damages and specific remedies such as injunctions reflects the different ways in which the injured right can be restored.

V. PUNITIVE DAMAGES

In discussing the various kinds of damages, I omitted punitive damages, to which I now turn. Regarding this class of damages, Zipursky claims that civil recourse has a clear advantage over corrective justice. Given the propensity of corrective justice to explain all damages awards as compensatory, Zipursky argues, corrective justice cannot account for the role that punitive damages—noncompensatory by definition—play in the actual operation of

45. Rookes v. Barnard, [1964] A.C. 1129 (H.L.) at 1221 (Eng.).

46. On aggravated damages as reparation for injury to dignity, see Allan Beever, *The Structure of Aggravated and Exemplary Damages*, 23 OXFORD J. OF LEGAL STUD. 87 (2003); John Murphy, *The Nature and Domain of Aggravated Damages*, 69 CAMBRIDGE L.J. 353 (2010).

American tort law.[47] This Part points out the infirmities in this superficially attractive argument.

Punitive damages are indeed inconsistent with corrective justice for reasons both of structure and of content. So far as structure is concerned, corrective justice requires that the normative considerations applicable to the relationship between plaintiff and defendant reflect the parties' correlative standing as doer and sufferer of the same injustice. Accordingly, it excludes considerations that refer to one of the parties without encompassing the correlative situation of the other. The standard justifications for punitive damages—deterrence and retribution—are one-sided considerations that focus not relationally on the parties as doer and sufferer of the same injustice, but unilaterally on the defendant (and anyone else who might be similarly situated) as doer. The place of such considerations is not private law but criminal law, because criminal law is concerned not with whether the accused has injured someone's particular right, but with whether the accused has acted inconsistently with the existence of a regime of rights in general.[48] In effect, punitive damages function as a defendant-financed reward for acting as a private prosecutor while subjecting the defendant to punishment without the protections of the criminal law.

So far as content is concerned, punitive damages are inconsistent with the role of rights in corrective justice. Punitive damages do not restore to plaintiffs what is rightfully theirs, but instead give them a windfall. Thus, punitive damages based on deterrence and retribution violate what I earlier termed the limitation thesis: the remedy should only restore the plaintiff's right and not give the plaintiff more than that right (or its equivalent).

To the extent, then, that punitive damages depend on considerations of retribution and deterrence, Zipursky's contention that corrective justice does not account for an important feature of American tort law is well grounded. However, Zipursky should feel little sense of triumph about this.

First, Zipursky and Goldberg of all people can hardly regard the rejection of deterrence-based punitive damages as a failure of corrective justice. The embarrassing fact is that their theory also does not account for this feature of contemporary American tort law, as they frankly acknowledge.[49] Their difficulty is that punitive damages that

47. Zipursky, *supra* note 1, at 712-13, 750; Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105, 136 (2005) [hereinafter Zipursky, *Punitive Damages*].

48. Ernest J. Weinrib, *Punishment and Disgorgement as Contract Remedies*, 78 CHI.-KENT L. REV. 55, 84-93 (2003).

49. "[T]he account I have given thus far distorts the law of punitive damages as it exists today" where courts "often look to whether the amount of the award is justifiable by reference to the state goal of deterrence." Zipursky, *supra* note 1, at 751.

aim at deterrence and retribution are not oriented toward redressing a wrong suffered by the plaintiff. The consequence is that the punitive damages act as a bounty for achieving public policy goals within the context of litigation by a single plaintiff, thereby giving rise to significant procedural concerns.[50] In other words, Zipursky and Goldberg think that punitive damages of this sort have the very problems that corrective justice ascribes to them.

Second, the differing theoretical objectives of the two approaches means that a lack of fit with American tort law creates a difficulty for civil recourse that is absent from corrective justice. Goldberg and Zipursky, naturally enough, present civil recourse mainly as a theory of American tort law, even to the extent of chastising corrective justice for not dealing with the role of the civil jury, "that important feature of American practice."[51] This preoccupation with American tort law is also evident in their lack of interest in legal systems that share corrective justice's antipathy to punitive damages, such as the law of Germany and (to a lesser extent) England.[52] Accordingly, the lack of congruence between the Goldberg-Zipursky theory and the operation of punitive damages in American law undermines their theory from their own point of view.

In contrast, corrective justice is not a theory of American tort law as such. Rather, it explicates the internal structure and presuppositions of the private law relationship, as found in sophisticated legal systems, in order to present at a high level of abstraction what it means for private law to be fair and coherent on its own terms. Because sophisticated systems of private law strive—not always with success, of course—to be fair and coherent, they are composed of norms that might exhibit the specific meaning of corrective justice for a particular legal system or legal tradition. Conversely, corrective justice provides an internal standpoint for the criticism of norms that are not consonant with a liability regime's own aspiration to fairness and coherence. Accordingly, if the corrective justice arguments against the American practice of punitive damages are sound, then corrective justice has fulfilled its theoretical function of providing the internal standpoint for identifying unfair or incoherent doctrine. Unlike civil recourse, corrective justice is unaffected by the fact that this particular feature of American legal practice does not conform to it.

In the Goldberg-Zipursky treatment of punitive damages, the real contest between civil recourse and corrective justice concerns a different kind of punitive damage award than that which aims at deter-

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50. JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, THE OXFORD INTRODUCTIONS TO U.S. LAW: TORTS 355-59 (Dennis Patterson ed., 2010).

51. Goldberg, *supra* note 31, at 576-77.

52. Nils Jansen & Lukas Rademacher, *Punitive Damages in Germany*, 25 TORT & INS. L. 75, 75-76 (2009); Vanessa Wilcox, *Punitive Damages in England*, 25 TORT & INS. L. 7, 7 (2009).

rence. They point out that in American tort law, punitive damages can also operate as a mechanism for punishing wrongs that are particularly egregious because the defendant's conduct was wanton or willful. Punitive damages of this sort "refer to the plaintiff's entitlement to vindication in light of the nature of the wrong done. By definition, we are not dealing with compensation here, so corrective justice theory is inapt."[53] In their view, the effort by corrective justice theory to reduce punitive damages of this sort to a special form of compensatory damages is inconsistent with the way the law conceptualizes them. This reduction is "an attempt not to explain, but to explain away."[54]

Here again, Goldberg and Zipursky are the prisoners of their preoccupation with American tort law. They correctly note in passing that punitive damages of this sort are known to other jurisdictions as "aggravated damages,"[55] but they do not follow through on what this observation implies. The idea of aggravated damages was first formulated in the English jurisprudence that restricted punitive damages to the minimum scope consistent with precedent.[56] Aggravated damages were held to be not punitive but compensatory. Even in Commonwealth jurisdictions (such as Canada) that reject the English approach to punitive damages, the idea that aggravated damages are not punitive but compensatory continues to prevail. As set out in Part IV of this Article, aggravated damages compensate, in accordance with corrective justice, for the injury that high-handed wrongdoing does to the plaintiff's dignity. There is no "attempt to explain away" here: Corrective justice takes aggravated damages as the law presents them—as a response to the dignitary aggravation of a wrong—and situates these damages within the conception of rights with which corrective justice operates. Only if one thinks that American law is the only theoretically significant body of law can one criticize the corrective justice approach to high-handed wrongdoing as reductive. In other words, the Goldberg-Zipursky argument depends on its premise that, "by definition, we are not dealing with compensation here,"[57] a definition that is merely a fiat of American law as they understand it.

Compared to corrective justice, the Goldberg-Zipursky treatment of punitive damages accomplishes little. It distinguishes damages that are oriented to deterrence from damages that are geared to wanton and willful wrongdoing. The latter sort of damages, unlike the former, are not properly described as an individual's usurpation of

53. Zipursky, *supra* note 1, at 713.
54. *Id.* at 712.
55. GOLDBERG & ZIPURSKY, *supra* note 50, at 355.
56. Rookes v. Barnard, [1964] H.L. 1129 at 1221 (Eng.).
57. Zipursky, *supra* note 1, at 713.

the state's power to punish.[58] In the American context, where both sorts of damages are covered by the same term, this may be a significant insight. However, it is not news to corrective justice, which reflects the usage of Commonwealth legal systems that distinguish these two kinds of damages even in their nomenclature.

In fact, aside from nomenclature, the difference between the aggravated damages of corrective justice and the punitive damages of civil recourse is hard to discern. Perhaps this is why Goldberg and Zipursky can so casually acknowledge that punitive damages are known elsewhere as aggravated damages. Goldberg and Zipursky explain their approved species of punitive damages as a response to the victimization that attends wanton wrongdoing. This victimization enhances the wrong, thereby making it legitimate for the victim to claim greater damages than would be allowed for wrongdoing that lacked the dimension of wantonness. For corrective justice, victimization involves an injury to dignity because the manner in which the wrongdoer violates the victim's right implies that the victim is a mere thing that lacks the dignity of a right-holder. Both approaches regard the manner in which the wrong is committed as having a relational significance that properly entitles the victim to claim a higher level of damages from the tortfeasor. Because jurisdictions that accord with corrective justice identify the wrong as an injury to dignity, they regard the damage award as compensating for this injury. Civil recourse, in contrast, looks at the process of wrongdoing without identifying what is thereby injured. Consequently, it regards the damage award as noncompensatory. Nothing substantial is at stake in this divergence. Both approaches ascribe the same consequences to the same behavior for the same reasons.[59]

VI. CIVIL RECOURSE IS CORRECTIVE JUSTICE

What has come of the efforts of Goldberg and Zipursky to distinguish civil recourse from corrective justice? In this Article I have elaborated the corrective justice conception of remedies and responded to several points of claimed difference. I have argued that Zipursky's particular objections to the continuity thesis fail, that Goldberg and Zipursky are mistaken in thinking that corrective justice cannot explain the optional nature of the plaintiff's recourse, that they are also mistaken in regarding the diversity of remedies as undermining corrective justice, and that the corrective justice account of

58. Zipursky, *Punitive Damages*, *supra* note 47, at 153.

59. Perhaps because they cannot anchor the punitive damage award in injury to an aspect of the plaintiff's right, Goldberg and Zipursky make presumed psychological reactions (the plaintiff's feeling of outrage or grievance, and consequent ideas of revenge or retaliation) salient in their account of punitive damages. Corrective justice does not share this reduction of the juridical to the psychological.

punitive damages is at least as illuminating as that of civil recourse. In none of these respects have Goldberg and Zipursky formulated viable grounds for favorably distinguishing their approach from corrective justice.

Aside from these criticisms of corrective justice, Goldberg and Zipursky claim that in the interval between the commission of the wrong and the issuance of a remedy the plaintiff has only a power and not a right. They regard this as a cornerstone of their approach and as their unique insight into the normative character of tort claims. In contrast, corrective justice argues for a position it regards both as more plausible in itself and as more consonant with the law: The power to sue and the resultant remedy enforce an existing right.

I want to suggest, in conclusion, that the reason that it is so hard to locate a sound and viable difference between corrective justice and civil recourse is that, at bottom, the latter is merely a version of the former. Of course, it is always the case that different versions of the same basic theoretical position vary in their formulations, emphases, and nuances. But the root question is whether the approaches differ significantly in their understanding of the most fundamental features of tort liability: the wrong and its connection to the remedy. Given that civil recourse follows the lead of corrective justice in conceiving wrongs as relational, the only possible difference of any significance between the two approaches hinges on how they conceptualize the connection of the wrong to the remedy.

The central theoretical question about remedies is this: Does the wrong stand to the remedy as a condition or as a reason?[60] The wrong is a condition of the remedy when its occurrence triggers the availability of a remedy without determining the remedy's scope. When this happens, the remedy actualizes considerations that are independent of, and even inconsistent with, the wrong. One example of this is the now discredited remoteness rule in England that the defendant is liable for all the unforeseeable but direct consequences of a negligent act on the ground that culpability is one thing, compensation another.[61] A more extreme example is the indemnified injunction for a nuisance, which requires the victim of the wrong to compensate the perpetrator for the inconvenience caused by the remedy.[62] When the wrong is merely its condition, the remedy can be geared to forms of what Goldberg and Zipursky call loss allocation (loss distribution, economic efficiency, deterrence, and so on)[63] that do not figure in the reasons for considering the defendant's action to have been wrongful.

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60. Ernest J. Weinrib, *Two Conceptions of Remedies*, *in* JUSTIFYING PRIVATE LAW REMEDIES 3, 3 (Charles EF Rickett ed., 2008).

61. *See, e.g.*, *In re* Polemis & Furness, Withy & Co., [1921] 3 K.B. 560 (C.A.).

62. *See* Spur Indus. v. Del E. Webb Dev. Co., 494 P.2d 700, 708 (Ariz. 1972).

63. Goldberg & Zipursky, *supra* note 6, at 927.

In contrast, the wrong is the reason for the remedy when the reason for regarding something as a wrong is also the sole reason for the law's awarding a remedy, and thus the sole determinant of the remedy's scope. Because the remedy cannot go beyond the reason for its existence, the remedy's structure and content are defined by the structure and content of the wrong. Consequently, the injustice to be remedied determines what is to be included in the award that remedies it. Conversely, a normative consideration that is irrelevant to the wrong cannot figure within the remedy.

The aim of the corrective justice account of remedies is to specify what it means for the wrong to stand to the remedy as its reason rather than its condition. Negatively formulated, the fact that considerations of loss allocation do not figure in the definition of the wrong entails that they also cannot ground any aspect of the remedy. Positively formulated, because the defendant's wrong injures the plaintiff's right, the remedy requires that the defendant restore to the plaintiff that right or its equivalent. As set out in Part II, this presupposes that the restored right is identical to, limited by, and continuous with the right that was injured.

On what side of this great divide between reason and condition does the Goldberg-Zipursky conception of civil recourse fall? There can be no doubt that civil recourse, like corrective justice, falls on the reason side. Goldberg and Zipursky would hardly have labored so mightily to show that tort law is about wrongs, not loss allocation, if they were going to leave open the possibility that loss allocation could be readmitted at the recourse stage. This exclusion of loss allocation at the recourse stage has to presuppose that the normative considerations relevant to the remedy mirror those relevant to the definition of the wrong, that is, that loss allocation does not figure in the remedy because it does not figure in the wrong. Thus, as in corrective justice, the nature of the wrong determines what counts as redress for the wrong.[64] If this is the case, then the very conflation of wrong and remedy for which they criticize corrective justice is presupposed in their own approach. From the corrective justice perspective, this is a virtue, not a defect. It allows civil recourse to gain in coherence what it loses in distinctiveness.

The theoretical mechanics of civil recourse confirm the intimate connection of wrong and recourse. Wrong and recourse are linked through the requirement of substantive standing, under which a claim against the defendant can be asserted only by a person relative to whom the defendant's conduct was wrongful. Goldberg and Zipursky insist that the requirement of substantive standing "is inte-

64. Recall that the reason that Goldberg and Zipursky consider punitive damages that aim at deterrence and punishment problematic is that such damages are not oriented to redressing the wrong. GOLDBERG & ZIPURSKY, *supra* note 50, at 355.

gral to the definition of tortious wrongdoing."[65] Thus, in their view, the availability of a remedy is limited to those whose injury falls within the reason for thinking of the defendant's action as tortious. Similarly, they are of the view that the injuries themselves are actionable only if they, too, come within the reason for thinking of the defendant's action as tortious,[66] thereby rejecting the old English jurisprudence that distinguished between culpability and compensation. These controversial views (which are exactly the corrective justice position)[67] show that, in the civil recourse approach, the definition of the wrong determines who can sue and for what. Moreover, Zipursky affirms that "[t]he notion of making whole is . . . a constraint, normally, on the extent to which [the] plaintiff may redress her wrong. One may not take from the tortfeasor more than one needs to make oneself whole. Yet one is entitled to take that much."[68] This sentiment echoes what I previously referred to as the limitation thesis in the corrective justice account of remedies; that plaintiffs are entitled to the restoration of their injured rights but not to more. The consequence is that, even for civil recourse, the wrong determines the extent of the plaintiff's redress.[69] Goldberg's insistence that the remedy "is . . . not built into the very definition of a tort claim"[70] pales against the role of the wrong in circumscribing who can sue, for what, and to what extent.

Given the way the theory of civil recourse is constructed, it could hardly avoid this integration of wrong and remedy. Adopting Blackstone's conception of tort compensation, Goldberg summarizes civil recourse as follows:

> In this picture, the basic rights of the individual (e.g., to bodily integrity) give rise to a right to retaliate against wrongdoers for actions that constitute wrongings of the victim, which in turn gives rise to a legal power to sue the wrongdoer that generates a claim to fair compensation.[71]

This picture sets out a sequence of three notional steps: (1) the wrongdoer violates a right of the victim; (2) in the absence of state

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65. Goldberg & Zipursky, *supra* note 6, at 960.

66. GOLDBERG & ZIPURSKY, *supra* note 50, at 103-09.

67. Ernest J. Weinrib, *The Disintegration of Duty*, *in* EXPLORING TORT LAW 143, 147 (M. Stuart Madden ed., 2005).

68. Zipursky, *Punitive Damages*, *supra* note 47, at 151.

69. The difference is that, for corrective justice the limitation thesis applies categorically, whereas for civil recourse the parallel idea applies "normally" and is therefore subject to exceptions. The only exceptions that they mention, however, are thin skulls and punitive damages that respond to victimization. Both of these can be explained consistently with the idea of making whole. On thin skulls, see Arthur Ripstein, *Civil Recourse and Separation of Wrongs and Remedies*, 39 FLA. ST. U. L. REV. 163 (2011). On punitive damages, see *supra* Part V.

70. Goldberg, *supra* note 7, at 468.

71. *Id.* at 463.

institutions the victim is entitled to retaliate for the injury; and (3) the victim's entitlement is transmuted into a legal power to sue the wrongdoer. The last two steps are both determined by the first one. The legal power of the third step is only to do what the victim is entitled to do, and no more. The transition from retaliation to litigation changes the mechanism of recovery, not what can legitimately be recovered. The victim's entitlement at the second step, in turn, is only to redress the wrong, and no more.[72] Therefore, when the judgment of a court replaces the subjectivity of the victim's redress, the principle on which both the court and the victim exercise their powers is limited by the wrong committed by the wrongdoer at step one. Thus, built into the wrong is the limit on what the wrongdoer, acting on his own or applying to a court, can legitimately do or claim in response. In other words, in this picture the wrong implies a remedy in accordance with corrective justice. As mentioned earlier, corrective justice is indeed what Blackstone postulates in observing that the remedy restores the right or its equivalent. What Goldberg and Zipursky take over from Blackstone's picture is corrective justice.

Academic controversy should not obscure the fact that the differences between civil recourse and corrective justice, if they exist at all, are gossamer thin. When one focuses on what is fundamental to the understanding of tort law, it is apparent that civil recourse has followed the lead of corrective justice regarding the conceptualization both of the wrong and of its connection to the remedy. To return to my starting point, the "not" in the title of Zipursky's article *Civil Recourse, Not Corrective Justice* was certainly not a typo. It was, however, a mischaracterization. In its essentials, civil recourse is corrective justice.

72. The retaliation of this step refers not to action that the victim feels justified in taking, but to the action that actually is justified. GOLDBERG & ZIPURSKY, *supra* note 50, at 354.